

Yancey Ford

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

CHARLES KUEPER,

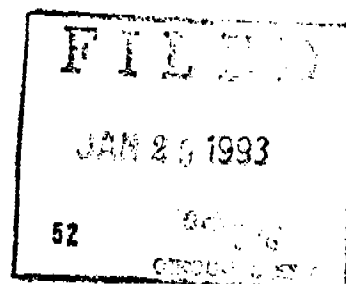
Plaintiff,

vs.

No. 91-L-734

R.J. REYNOLDS TOBACCO COMPANY,
THE TOBACCO INSTITUTE, INC., and
REESE DRUGS, INC.,

Defendants.



REPORT OF PROCEEDINGS

January 21, 1993

Before the HONORABLE JAMES K. DONOVAN, Circuit Judge,
and a Jury.

APPEARANCES:

MR. BRUCE N. COOK, Attorney at Law,
On behalf of the Plaintiff;

MR. RICHARD E. BOYLE and MR. PAUL G. CRIST,
Attorneys at Law,
On behalf of Defendant R.J. Reynolds Tobacco Company;

MR. LARRY HEPLER and MR. JAMES GOOLD,
Attorneys at Law,
On behalf of Defendant Tobacco Institute.

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C-019249

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EXHIBITS

	<u>MARKED</u>	<u>ADMITTED</u>
Plaintiff's Exhibit No. 67*		8129
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* Admitted for Limited Purposes

** Admitted for Demonstrative Purposes

RJ Reynolds' Exhibit No. 234		8162
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1 BE IT REMEMBERED AND CERTIFIED that heretofore, on
2 to-wit: Thursday, January 21, 1993, being one of the regular
3 judicial days of this Court, the matter as hereinbefore set
4 forth came on for hearing before the HONORABLE JAMES K.
5 DONOVAN, Circuit Judge in and for the Twentieth Judicial
6 Circuit, State of Illinois, and a Jury, and the following was
7 had of record, to-wit:

8 * * * * *

9 (The following proceedings were reported by
10 Maureen A. Schaefer, CSR, License #084-001650, RPR,
11 beginning at 9:30 a.m.)

12 (Court convened. A discussion was held off the
13 record.)

14 THE COURT: Mr. Crist, do you have a number where
15 we left off?

16 MR. CRIST: Your Honor, I believe that it was at
17 about 47.

18 THE COURT: Okay. Let's go--

19 MR. CRIST: Your Honor, if I can--

20 THE COURT: Yeah.

21 MR. CRIST: --this morning before we went on the
22 record, we just went through a series of -- of magazines
23 which Mr. Cook had marked as exhibits, and it is my
24 understanding that the court intends to treat those as it

1 treated the other magazines that we dealt with when we last
2 dealt with exhibits two days or so ago. I just wanted to
3 make sure that the record does reflect that all of the
4 objections that we made with respect to the magazines which
5 were a discussion at that time and which we discussed in the
6 course of the trial have been renewed with respect to each of
7 the magazines that -- that have been admitted into evidence
8 for whatever purpose.

9 THE COURT: Now, Mr. Cook, do you have any
10 objection to that procedure, that we treat everything that
11 happened after -- magazines after I guess the summer of 1969
12 in one way, the way I've ruled previously, and all the ones
13 that came before? They just want to preserve their record.
14 Do you have any objection to that?

15 MR. COOK: No, sir.

16 THE COURT: Good. Okay. I think it's fully
17 preserved.

18 MR. CRIST: Your Honor, in addition to that, I
19 would submit that during the examination of Mr. Kueper, it
20 became abundantly clear that advertising had absolutely
21 nothing to do with him or any decisions that he ever made
22 with respect to smoking and that, therefore, that there has
23 been a critical failure of proof in that regard, and I would
24 move for a mistrial on that ground because I think that there

1 has been just a horrible abundance of evidence that has
2 characterized this trial from day one and I think it's -- and
3 I think it's been unfairly prejudicial to the Defendants and,
4 therefore, would move on that basis for a mistrial.

5 THE COURT: Would you respond please, Mr. Cook?

6 MR. COOK: Yes. I oppose it. Do you wish me to
7 argue it?

8 THE COURT: No.

9 MR. HEPLER: We join, Your Honor.

10 THE COURT: Okay. I'm going to deny the motion for
11 a mistrial. Your point is well taken. I assume we'll
12 address it also in the directed verdict area. Okay.

13 Let's -- Plaintiff's 47, I don't have a description of.

14 MR. CRIST: Yeah. Before we move to that, I'd like
15 to jump back, if I could, just for a second. We discussed
16 the other day what had been marked as Plaintiff's
17 Exhibit 19G.

18 THE COURT: 19G.

19 MR. CRIST: Yes, Your Honor. And the point that I
20 wanted to make with respect to that is that in the course of
21 reviewing the materials, it -- it came to my attention that
22 Plaintiff's Exhibit 19G, which I believe has been admitted
23 into evidence, is a duplicate of what was previously marked
24 as Plaintiff's Exhibit 236.

1 THE COURT: 19G I have as a Tobacco Institute
2 Newsletter, November 16th, 1982, first page, Plaintiff's 19G.

3 MR. CRIST: I don't know that 236 was used, but--

4 THE COURT: And you say that -- that is the same --
5 let's see -- as Plaintiff's 2 -- 236. Well, I don't have a
6 236 marked, which could be good or bad at this point. I
7 don't have a 236--

8 MR. CRIST: Okay.

9 THE COURT: --which means it was probably marked
10 but--

11 MR. CRIST: Okay.

12 THE COURT: --maybe never used, that I saw. Okay.
13 For the time being, I'm -- I just don't have a 236.

14 MR. CRIST: Okay.

15 THE COURT: We'll leave it at that. Now, that gets
16 us back to Plaintiff's 47. And does anyone have a
17 description of what Plaintiff's 47 is?

18 MR. COOK: Yes. That's a document that was not
19 offered.

20 THE COURT: You're withdrawing it, then?

21 MR. COOK: It's right over there (indicating). I
22 had three TANS documents. I only used two.

23 THE COURT: Are you withdrawing it?

24 MR. COOK: Yes, sir.

1 THE COURT: Okay. Forty-seven's withdrawn. Thank
2 you.

3 MR. COOK: The only question that I would have, how
4 can I withdraw something that's not been offered? But never
5 mind. It's a semantic--

6 MR. CRIST: You don't even know what it is.

7 MR. COOK: I never used it at all.

8 THE COURT: Well--

9 MR. CRIST: It's wiped out then.

10 MR. COOK: That's okay. I've withdrawn it. That's
11 -- that's what--

12 THE COURT: I like a thought like that.

13 MR. COOK: Okay.

14 THE COURT: You're suggesting that--

15 MR. COOK: No. No.

16 THE COURT: Maybe the way we ought to proceed is
17 you just move in the ones you want and I'll only pay
18 attention to that. If it will take less time, it's a
19 thought.

20 MR. COOK: That's--

21 THE COURT: Do you feel comfortable with that?

22 MR. COOK: I don't know that they do or the court
23 does. It doesn't make any difference to me.

24 MR. CRIST: I think just go through the ones that

1 you have, judge, and if -- 47A, 47B, whatever--

2 THE COURT: Okay.

3 MR. CRIST: --and tell us what you have and if we
4 have a disagreement with them or Mr. Cook has an additional
5 exhibit that--

6 THE COURT: Okay. Plaintiff's 47A is a letter,
7 Illinois/Iowa Newsletter, March 19th, 1981, and I do not have
8 it as admitted.

9 MR. COOK: I'd move its admission, Your Honor.

10 MR. CRIST: Your Honor, we have it admitted in part
11 at Page 5349.

12 THE COURT: Okay. Well, the ruling of the court on
13 that page will stand and any limitations on the use of it
14 will also continue, but I'll just mark it as admitted as
15 previously indicated by the court. Okay. Plaintiff's 47B,
16 another Illinois/Iowa Newsletter. I don't have it as
17 admitted.

18 MR. CRIST: It's admitted in part, Your Honor, at
19 Page 5352.

20 THE COURT: 5352. Thank you. Plaintiff's 48 is
21 admitted. That's one of the magazines that falls about into
22 the category we talked about this morning. 49, admitted;
23 it's a magazine. Plaintiff's 50 -- now that's a Science--

24 MR. COOK: Popular Science with Charlton Heston on

1 the back of it. I'd move its admission.

2 THE COURT: 1954. For some reason I don't have
3 that one as--

4 MR. CRIST: Your Honor, that -- it is -- it was
5 admitted against Reynolds and against TI for limited purposes
6 at Pages 7517 and 7519.

7 THE COURT: Okay. Thank you. Plaintiff's 51, a
8 magazine, admitted. Fifty-two, admitted. Fifty-three,
9 admitted. Fifty-four, admitted. Plaintiff's 55, medical
10 book, Pulmonary Disease and Disorders. Oop.

11 MR. CRIST: Your Honor, what'd you have on 54?

12 THE COURT: I've got Plaintiff's 54 as Smoking and
13 Health, a book, Page 4 admitted, yes, on--

14 MR. CRIST: Okay.

15 THE COURT: --December 21st, 1992.

16 MR. COOK: I suspect that refers to Plaintiff's
17 Exhibit Number 20.

18 MR. CRIST: No.

19 MR. COOK: Doesn't it?

20 MR. CRIST: Fifty-four is a '79 Surgeon General's
21 Report.

22 MR. COOK: Oh. '79. Okay. Good.

23 MR. CRIST: Your Honor, there are pages or
24 something that have been--

1 THE COURT: Page 4 is all I have as admitted on
2 this particular exhibit. Plaintiff's 54, Page 4. Anybody
3 have something different?

4 MR. HEPLER: Hang on a second, judge.

5 THE COURT: Okay.

6 MR. COOK: I don't even know that there is a
7 Page 4. There's a Roman numeral IV.

8 THE COURT: I could have -- could have made that
9 mistake, I think. Is that--

10 MR. COOK: I read to them the portion of it, "Is
11 nothing short of national tragedy that so much death and
12 disease are wrought by a powerful habit often taken up by
13 unsuspecting children lured by seductive multi-million-dollar
14 cigarette advertising campaigns."

15 THE COURT: What page is that?

16 MR. COOK: That's Roman numeral IV.

17 THE COURT: Page Roman numeral IV or Paragraph
18 Roman numeral IV?

19 MR. COOK: No, sir, that's from Page Roman numeral
20 IV--

21 THE COURT: Okay.

22 MR. COOK: --the secretary's forward to the 1979--
23 so I think you're right.

24 THE COURT: I'm going to change my designation,

1 though, to a Roman numeral, though. Okay. I got that as
2 admitted.

3 MR. CRIST: Your Honor, we also have that the last
4 sentence on the first page was admitted.

5 MR. COOK: That would be Roman numeral I.

6 MR. CRIST: I don't know that.

7 MR. COOK: Yes. That's--

8 MR. CRIST: 4986.

9 MR. COOK: Right.

10 THE COURT: Okay. Thank you. Okay.
11 Plaintiff's 55 is a medical book.

12 MR. COOK: I haven't offered them. I'll -- I'll
13 withdraw them, but I -- I haven't offered them.

14 THE COURT: Okay.

15 MR. COOK: And 58, I don't intend to offer that.

16 MR. CRIST: Fifty-six, Your Honor, I think is also
17 one that -- it's also a book.

18 MR. COOK: They're right here, all three of them.

19 MR. CRIST: Right.

20 MR. COOK: They're your books. We may be going to
21 use them today.

22 THE COURT: That's right. Fifty-five, fifty-six
23 and fifty-seven, though, are withdrawn in the Plaintiff's
24 case in chief. Okay. That's nice. Nice.

1 Plaintiff's 58 is the Golden Leaves book.

2 MR. GOOLD: Golden Leaf.

3 MR. COOK: I'm not offering it, judge.

4 THE COURT: Thank you. Plaintiff's 60 has been
5 previously admitted, by my records. It's a TI News Release,
6 March 25th, 1988, Northwest Airlines.

7 MR. HEPLER: Right.

8 THE COURT: Plaintiff's 61, chart of officers and
9 directors of TI, admitted November 20th. Plaintiff's 62, a
10 letter dated January 10th, 1990, and it has been admitted. I
11 don't have much of a description on that. Would it -- would
12 it be Young Adult Market?

13 MR. CRIST: Your Honor, this is--

14 MR. COOK: Is that the Oklahoma one or the--

15 MR. CRIST: No. That's this one (indicating).
16 This letter's dated April 5th, '90. No, that's -- that's --
17 62 -- is that what we're on?

18 THE COURT: Plaintiff's 62.

19 MR. CRIST: It's this one (indicating).

20 THE COURT: I've got the wrong -- it says
21 "Plaintiff's Exhibit 19H," but it's changed some way?

22 MR. COOK: It's both.

23 THE COURT: Okay.

24 MR. COOK: That 62 is the blow-up of 19H.

1 THE COURT: Oh. Okay. That's a helpful point.

2 MR. CRIST: Now this is 62. This is 62

3 (indicating).

4 MR. COOK: What's that one?

5 MR. HEPLER: Florida.

6 MR. CRIST: This is Florida.

7 THE COURT: January 10th, 1990.

8 MR. HEPLER: My records show 1-10-90, Florida.

9 MR. COOK: Okay. This is 19H. Oh. I put this on
10 here to refer it to 62 for me.

11 MR. CRIST: Okay.

12 MR. COOK: Because it says on the back of it
13 "Plaintiff's Exhibit 19H."

14 THE COURT: Yeah.

15 MR. CRIST: It says it on the front, too.

16 MR. COOK: It says it on the front, too. My
17 goodness.

18 THE COURT: I bet that's what it is. Okay. So, I
19 do have that Plaintiff's 62 is admitted.

20 MR. COOK: Are you going to do that first today?

21 MR. CRIST: (Nodding head.)

22 MR. COOK: Do you have Yancey here?

23 MR. CRIST: (Nodding head.)

24 MR. COOK: Good. Hi, Joe. Hi, Jim.

1 MR. CRIST: Your Honor, there was also a cover page
2 on that, on 62--

3 THE COURT: Okay.

4 MR. CRIST: --from an anonymous person, undated, to
5 Dr. Louis Sullivan.

6 THE COURT: Did that come into evidence?

7 MR. CRIST: I -- I don't think so.

8 THE COURT: All I really reflect is that letter. I
9 don't have any reference to a cover sheet or anything.

10 MR. CRIST: I don't think it did.

11 MR. COOK: What -- I was--

12 THE COURT: Mr. Crist said there might have been
13 some type of a cover sheet from an anonymous person connected
14 with that.

15 MR. COOK: It should be on 19H, on the original
16 short document.

17 THE COURT: Was it admitted with -- did you say 19H
18 or Plaintiff's 62?

19 MR. COOK: It should be 19H.

20 THE COURT: Okay.

21 MR. COOK: Let's see what--

22 MR. CRIST: This is what -- this is what it looks
23 like (indicating).

24 MR. COOK: 19H has -- should have this letter

1 (indicating) on it.

2 THE COURT: Okay.

3 MR. COOK: But maybe we better check it to make
4 sure that it does.

5 THE COURT: If you -- see, I don't want to be too
6 confusing, but see, that says "January 10th." I think that's
7 Plaintiff's 62, not 19H.

8 MR. COOK: What -- what -- huh--

9 MR. CRIST: Bruce, here are the blow-ups. Is that
10 what you want? Yeah. See, this is--

11 MR. COOK: You're right. We need Plaintiff's 62
12 instead, Darlous. I'm sorry. And see if it has the--

13 MR. CRIST: I mean, it's on the exhibit. There's
14 no question about that. The issue is whether or not it was
15 admitted.

16 THE COURT: Right.

17 MR. CRIST: I'm almost certain it was not.

18 MR. COOK: That portion of the exhibit. I may have
19 removed it.

20 MR. CRIST: No, I don't think so.

21 MR. HEPLER: It might have been one of those that
22 you redacted right on the scene.

23 MR. COOK: It could -- it could have been some
24 on-the-scene redaction.

1 Is that it? No.

2 MR. CRIST: There it is.

3 MR. COOK: Yes. It has the -- the letter on the
4 front of it. If 62 isn't in evidence, I would offer it in
5 evidence.

6 THE COURT: Sixty-two is in evidence. I guess the
7 question was, whether that exhibit -- whether that -- it was
8 made part of it; huh? -- oh, right -- the sticker's right on
9 the top.

10 MR. CRIST: Your Honor, I believe that Page 2 of
11 that is in evidence.

12 MR. COOK: I would move Page 1 into evidence if
13 Page 1 is not.

14 THE COURT: Okay. What date do you have that as
15 being admitted, or do you have a date on that?

16 MR. CRIST: All I have is a page, judge. 1897.

17 THE COURT: Okay.

18 MR. COOK: We might as well leave this one out, I
19 would think (indicating).

20 MR. CRIST: Yeah.

21 MR. COOK: I'll put it right there for you.

22 Joe's fixing my glasses. Isn't that nice? Jack
23 Carey gave him a screwdriver with a screw.

24 THE COURT: Okay. We better look at this

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1 transcript on the page that you've indicated. It does
2 discuss this. I haven't got it all yet, but hang on. I can
3 -- I can get it and print it out for you, I guess. What day
4 is this? 11-23. Let me get out of this.

5 I'm sorry. Yes. Okay.

6 MR. COOK: Who's -- who's conducting witness school
7 this -- oh. Crist is gone. Ah. I mean Stuhan. Sorry. Is
8 he having witness school in Seattle? I understand they had a
9 bad storm there.

10 MR. CRIST: Yeah.

11 MR. COOK: Terrible. It's a good thing that Dr. --
12 it's funny his name escapes me so quickly -- Mottet -- he's
13 lucky he was here.

14 Do you think I can--

15 THE COURT: Oh, you guys have got yours. Okay.
16 See if you make any sense out of that.

17 Does it make sense?

18 MR. COOK: Yes. I -- I recall what happened with
19 it. The judge admitted it into evidence, but the only thing
20 that's not clear on the record and should be clear on the
21 record is that the -- I assume it's going to be clarified
22 this morning, anyway, that the first page of this document,
23 which has not been read to the jury at this point, is a
24 business record of the Defendant RJR. I knew that they had

1 to respond to it. So I can wait and -- I mean it -- it's
2 coming in here this morning.

3 THE COURT: What was this business record
4 foundation that you laid on that first page, it was an
5 anonymous document they received?

6 MR. COOK: It's an anonymous document that they
7 received with -- along with the underlying document--

8 THE COURT: Uh-huh.

9 MR. COOK: --and RJR got a copy of this guy's
10 letter--

11 THE COURT: Yeah.

12 MR. COOK: --to Louis Sullivan, sending this
13 (indicating) to RJR and Louis Sullivan.

14 THE COURT: I'm following that part of it. And
15 you're moving it in as an exception to the hearsay rule as a
16 business record, the first page?

17 MR. COOK: Yes, sir.

18 THE COURT: Okay. Any objection?

19 MR. CRIST: Absolutely. I mean, how can an
20 anonymous letter be anything other than pure hearsay, the
21 fact that some flake sends a letter or some non-flake sends a
22 letter to a company somehow convert that into a business
23 record?

24 THE COURT: Sustained. Okay. Page 2's in, though,

1 but we'll see how it can be utilized later today. Okay. I
2 don't think it qualifies as a business record.

3 MR. COOK: Well--

4 MR. HEPLER: And neither did Bruce.

5 THE COURT: But--

6 MR. COOK: Take note of my sotto voce comment.

7 THE COURT: Off the top of your head to come up
8 with that that quick is a--

9 MR. COOK: What? -- the "Well"?

10 THE COURT: The business at the well and the whole
11 thing.

12 MR. COOK: Who'd like to hear my impression of
13 Elvis Presley? "Thank you very much."

14 THE COURT: Okay. We've got to keep an eye on the
15 clock.

16 MR. CRIST: Your Honor, I've got just a couple more
17 minutes on this, judge--

18 THE COURT: Okay.

19 MR. CRIST: --and then to the depositions.

20 THE COURT: Okay. Next is Plaintiff's exhibit --
21 oh, boy.

22 MR. CRIST: --63, magazine.

23 THE COURT: Well, I did find my second Plaintiff's
24 Exhibit 62, though, St. Louis Post Dispatch, 5-26-50.

1 MR. COOK: What the hell is that?

2 MR. CRIST: That's probably a Defendants's exhibit,
3 Your Honor.

4 THE COURT: That's probably what happened. You're
5 right, because sometimes I would do that. Good -- excellent
6 point. Okay. I think you're right. Okay. Plaintiff's 63
7 -- we've already taken care of 63, 64, 65. That gets us to
8 Plaintiff's 66, Tobacco Institute, Voice of the Industry,
9 Edward F. Ragland. Oh, boy. It was put in as admitted, 12--

10 MR. CRIST: We have a different 66. I don't know
11 what you're talking about.

12 MR. HEPLER: We have a Life magazine.

13 MR. COOK: We have two.

14 THE COURT: We have two. Is yours Life magazine?

15 MR. HEPLER: Yes.

16 MR. GOOLD: Yes.

17 THE COURT: Well, I got one of those, too.

18 MR. CRIST: Can I see what your description -- the
19 judge's description on that is?

20 THE COURT: Well--

21 MR. CRIST: I don't know -- I don't know what the
22 other 66 is.

23 Darlous, do you have two 66s?

24 MR. COOK: Do you have the magazines, Darlous? And

1 we'll straighten them out.

2 THE COURT: Well, the magazine's okay, Plaintiff's
3 66, and that's in.

4 MR. COOK: These broads are something (indicating).

5 THE COURT: Unless we find this Tobacco Institute
6 Voice of the Industry one--

7 MR. COOK: Does she have a 66 like that?

8 MR. CRIST: I think if you search the record,
9 you'll find no reference to it.

10 MR. COOK: Well, let's scratch it.

11 THE COURT: Okay. I'm just going to delete it for
12 the time being.

13 MR. COOK: And we'll leave the Life magazine.

14 THE COURT: Good. Plaintiff's 67 is the C.V. of
15 Mark Robert Wick. Just a little housekeeping thing there, I
16 would suppose. How does--

17 MR. COOK: He identified it. I'd move it into
18 evidence.

19 MR. CRIST: Your Honor, I don't think C.V.s are
20 admissible, and they're solely used to allow a witness to
21 refresh his recollection if necessary in addition to that to
22 qualify him as an expert witness. I don't think that it's
23 something that comes into evidence, nor do I think that it
24 was something that could even conceivably go to the jury.

1 MR. HEPLER: Unless there's some stipulation by
2 counsel that it can be put in in some asked-and-answered
3 format--

4 THE COURT: Right.

5 MR. HEPLER: --to do it.

6 THE COURT: Into the record.

7 MR. HEPLER: But there's no such stipulation, and I
8 don't know how it goes to the jury or how it comes--

9 MR. COOK: I'm not suggesting that it goes to the
10 jury. But I don't understand if a man identifies a document
11 as a writing that he made and -- I mean, what's the
12 objection? Hearsay? Relevance? I don't understand what
13 your objection is. I -- I'm not suggesting it goes to the
14 jury. I -- I think, is that if -- if he prepares a document
15 that has an up-to-date listing of his publications, that --
16 that it can be admitted in evidence. Why is it any different
17 than any other any document identified by somebody?

18 THE COURT: Several -- not with just this witness.
19 There have been C.V.s used I think with several of the
20 defense experts, also. And I would assume that possibly one
21 or all of you might want to make reference to some portion of
22 the C.V. in your closing argument, or at least that's
23 possible, and that's why it was at least handed and
24 identified to the witness.

C-013210

1 MR. COOK: Would you get that for me please,
2 Darlous, 67?

3 THE COURT: Well, this is kind of strange. I'm
4 going to admit it into evidence to reflect what the man would
5 have testified to, and this will apply not only to this C.V.
6 but also the C.V.s of the Defendants' experts. And I think
7 that's the only way to have the transcript complete, also.

8 Maureen, can you stop typing for a second.

9 (A discussion was held off the record.)

10 THE COURT: Or if he testified, but in this case
11 all the C.V.s that we've utilized -- I don't want to push
12 somebody to the point where they have to read that C.V. from
13 the stand on the next expert witness. Okay? So I'm
14 admitting it in for that limited purpose as to what he would
15 testify to. And if any of you want to make reference to the
16 content of a C.V. in closing argument, you can, but it will
17 not go to the jury. Okay. How about the next one? So I'm
18 going to put a "Yes" on that. I got Plaintiff's 68 is an
19 American Journal of Pathology.

20 (Plaintiff's Exhibit Number 67 was admitted into
21 evidence, for limited purposes.)

22 MR. CRIST: American Journal of Clinical Pathology.

23 THE COURT: Clinical Pathology. And I do not have
24 it as admitted.

1 MR. COOK: I'd move its admission.

2 MR. CRIST: Your Honor, I object to it on the basis
3 that it is a compilation of what the Fifth District has
4 called pure, pure hearsay.

5 THE COURT: How was it utilized?

6 MR. CRIST: I also object to it on the basis that
7 it's irrelevant and immaterial. Your Honor, it was utilized
8 in a sense that I think Mr. Cook had Dr. Mottet yesterday
9 identify Dr. Wick as the -- the -- the or an editor of that
10 magazine, and in addition to that, he had Dr. Wick identify
11 one of the articles in there as an article which Dr. Wick had
12 written. I think Mr. Cook read to him the title of it just
13 to show the scientific gobbledygook that was in the title.

14 THE COURT: It was a document that was used to
15 impeach the witness' qualifications or abilities?

16 MR. COOK: No. It was a document that -- that was
17 used by Dr. Wick. He's the editor-in-chief of this Peer
18 Review magazine. It -- the subject matter of the -- of this
19 particular article -- or list of Peer Review articles is not
20 probative of any fact in -- in Mr Kueper's case except to the
21 extent that it has to do with Dr. Wick's qualifications and
22 -- and experience. I asked Dr. Wick about -- if he was
23 editor-in-chief and then had him identify the magazine that
24 he's editor in chief of. Again, it's a document that I don't

1 suggest should go to the jury. It's been displayed to the
2 jury.

3 THE COURT: Uh-huh.

4 MR. COOK: And I -- you know, that -- its use has
5 been for illustrative purposes and to buttress the
6 credentials of Dr. Wick. So--

7 THE COURT: Is it a demonstrative exhibit?

8 MR. COOK: It is a demonstrative exhibit. That's
9 exactly what it is, as are all the magazines.

10 THE COURT: Okay. I'll admit it in as a
11 demonstrative exhibit. It is not admitted substantively.

12 (Plaintiff's Exhibit Number 68 was admitted into
13 evidence.)

14 MR. COOK: You know, I think we're in a mixed
15 discussion here. I'm not talking -- I'm not suggesting to
16 you that I think that this should go to the jury
17 (indicating), but I don't know how it -- how it stays of
18 record without being admitted at least for the purposes of
19 the record.

20 MR. CRIST: I simply think it's marked -- can be
21 marked as part of the record.

22 MR. COOK: If it's not in evidence, I can withdraw
23 it. It belongs to me, not the court; right?

24 MR. CRIST: So withdraw it.

1 THE COURT: It was a hypothetical discussion there,
2 Bruce. Okay. Okay. It's demonstrative purposes.

3 MR. COOK: Demonstrative.

4 THE COURT: Not to go to the jury. Plaintiff's 69
5 is admitted, hospital exam. Plaintiff's 70, Health and
6 Consequences of Smoking for Women, a book.

7 MR. CRIST: That's one of the Surgeon General's
8 Reports, Your Honor.

9 THE COURT: Okay. Mr. Cook, I don't have that as
10 admitted.

11 MR. COOK: Well, again, it -- it's been referred to
12 for purposes of -- of demonstration, and I think for that
13 limited purpose, not the matters contained therein, on all
14 the Surgeon General's Reports, is that you have limited their
15 admission to particular pages, and so, in any event, I would
16 make it -- the offer of it for the limited purposes of
17 demonstration that there was such a report.

18 THE COURT: Okay. What's the defense position?

19 MR. CRIST: Your Honor, I would incorporate by this
20 reference our motion in limine and all prior arguments we've
21 had with respect to the inadmissibility of the Surgeon
22 General's Reports and various Surgeon General's Reports. And
23 with respect to this one, judge, other than having it marked,
24 I don't believe that there's been any use whatsoever of that

1 report other than perhaps to flash a cover page of it at a
2 witness or two. There's been no use of it.

3 MR. COOK: I think you're right, but I mean should
4 it -- my question is, is that should it stay here since it's
5 TI's Surgeon General's Report, or should they take it with
6 them, and -- and I -- I really don't have any strong feelings
7 about it one way or another.

8 THE COURT: Well, in this instance, since it's just
9 the cover page that's been shown to people at this point,
10 I'll--

11 MR. HEPLER: Withdrawn.

12 THE COURT: Well, I'll just deny admission of the
13 exhibit.

14 MR. COOK: Okay.

15 THE COURT: But it will still be available here in
16 the courtroom. It might come up that you'll utilize it.

17 MR. COOK: Just remember this, judge, denial is not
18 a river in Egypt.

19 THE COURT: Did you get that, Maureen?

20 THE REPORTER: (Nodding head.)

21 THE COURT: Yes, she got it. Okay. Let's go
22 ahead.

23 MR. CRIST: Your Honor, I assume that with respect
24 to these, and maybe these reports that Mr. Cook has marked,

1 have come from either our files or from -- from perhaps TI's
2 files or perhaps from his own files, but I assume that we
3 will be substituting copies or supplement this in the record.

4 MR. COOK: I -- I certainly won't have any
5 objection to things being withdrawn.

6 THE COURT: When and if this trial ends, we have a
7 monumental task in front of us, of going through these
8 exhibits and placing--

9 MR. COOK: You and Mary Jane, or you and Harriett.

10 THE COURT: That's right, but somebody. We've got
11 to drop these blow-ups to small ones and everything else.

12 MR. COOK: Most of the blow-ups are small ones.

13 THE COURT: Well, we'll have some kind of record on
14 what was blown up, what wasn't, but we've got to go through
15 all this stuff. And I'll freely let you substitute stuff
16 out, but we'll have to have a court order. Okay. The next
17 one.

18 MR. CRIST: Seventy-one.

19 THE COURT: Seventy-one, Rolling Stone, in. One --
20 Plaintiff's 72, one pack of Virginia Slims cigarettes.

21 MR. COOK: I'd offer them.

22 THE COURT: Well, it's a product of RJR Reynolds?

23 MR. CRIST: No, Your Honor.

24 MR. COOK: No, sir.

1 MR. CRIST: It is not.

2 MR. COOK: It's a product of Phillip Morris. It
3 was used in the cross examination of Mr. Campbell and other
4 witnesses as to whether or not they were soliciting a female
5 market. I -- again--

6 THE COURT: Okay.

7 MR. COOK: --it's a witness -- I mean, it's an
8 exhibit of very little importance, but it has been handed to
9 witnesses and witnesses have looked at it and so--

10 THE COURT: I think this might fall in that
11 demonstrative exhibit area.

12 MR. COOK: I think it does.

13 THE COURT: But what do you think, Mr. Crist?

14 MR. CRIST: I think it's irrelevant and immaterial
15 to any issue in the case.

16 MR. HEPLER: It has absolutely no relevance or
17 materiality to the case, or probative value.

18 MR. COOK: I don't agree with that.

19 THE COURT: Well, I'm admitting it for
20 demonstrative purposes only to assist the jury in
21 understanding the examination at that time. I'm -- there's
22 no substantive aspect of this exhibit. Okay. Okay.
23 Seventy-three's in. Seventy-four's in. Seventy-five's in.
24 Seventy-five--

1 (Plaintiff's Exhibit Number 72 was admitted into
2 evidence, for demonstrative purposes.)

3 MR. CRIST: Your Honor -- oh. Seventy-four. Okay.
4 I'm sorry.

5 THE COURT: I've got a 75A, B, C, D, E, F, and
6 they're all -- well, there's -- the first three are Collier's
7 magazines and the last three are Life magazines.

8 MR. CRIST: Right.

9 THE COURT: They're the same -- if you're moving
10 these in, I'll -- it would be the same basis on the other
11 magazines of the similar time period. These are all '46 --
12 1946, it looks like.

13 MR. COOK: Yes, sir.

14 MR. HEPLER: I show them as admitted.

15 THE COURT: You show them as admitted, Mr. Hepler?

16 MR. HEPLER: Subject to limiting objection.

17 MR. CRIST: Your Honor, I think they probably just
18 were kind of globally in there, what we talked about this
19 morning.

20 THE COURT: Well, it definitely falls into that
21 pattern, so that's the way I'm going to mark them now. So
22 that's 75A through F and they're admitted as I described
23 previously. Okay. We'll get those in.

24 (Plaintiff's Exhibits Numbers 75A through 75F were

1 admitted into evidence.)

2 THE COURT: Okay. Seventy-six is a magazine that's
3 admitted. Seventy-seven, admitted. Seventy-eight, admitted.
4 Seventy-nine, admitted. Eighty, admitted. Eighty-one,
5 admitted. 81A is admitted. Eighty-two -- I do not have--

6 MR. HEPLER: I don't have an 82.

7 THE COURT: Okay. What I have as 82 is "An Ounce
8 of Prevention is Worth a Pound of Cure," Time magazine,
9 1-7-46, an advertisement.

10 MR. COOK: That was a blow-up -- blow-up that I
11 used--

12 THE COURT: Okay.

13 MR. COOK: And may be this one right here
14 (indicating) was an Old Gold.

15 MR. CRIST: Your Honor, we have no information on
16 this at all.

17 THE COURT: Okay. Let's see if he can locate that.

18 MR. CRIST: We have a page reference, but that's
19 all we have.

20 MR. HEPLER: Oh, it's actually -- we show that as
21 Exhibit 84, Your Honor.

22 THE COURT: Could be.

23 MR. HEPLER: It was offered and denied.

24 MR. COOK: I think it was.

1 MR. HEPLER: It was -- I -- yeah. It wasn't 82.
2 We show what you're talking about as Exhibit 84, P.M. ad,
3 "Ounce of Prevention," and it says, "Source, 84," and it
4 says, "Offered and denied."

5 THE COURT: Okay. Now, I've got an 84. I describe
6 it simply as Time magazine, but I've got it as admitted.

7 MR. HEPLER: Well, that's 84A, Time, January,
8 March, '46, all ads, and that he ended up marking that as
9 84A.

10 THE COURT: You got anything else, Mr. Cook, on
11 this Ounce of Prevention thing? Does that make sense?

12 MR. COOK: It's around here.

13 THE COURT: Well, I mean Mr. Hepler said you moved
14 it and it was not admitted. Is that your memory?

15 MR. COOK: I used it.

16 MR. CRIST: Your Honor, could I -- could I suggest
17 that this might be an appropriate time just to break and see
18 if we can make sense out of this and turn to the depositions.

19 THE COURT: Okay.

20 MR. CRIST: What?

21 MR. GOOLD: Give me a second.

22 MR. COOK: Now why are you leaving? Because you've
23 not told me why you're leaving.

24 MR. CRIST: Bruce, because you're not dressed up

1 nicely and I'm deeply offended.

2 MR. COOK: Damn it. I knew I should have wore
3 socks.

4 MR. GOOLD: Your Honor, I have on Page 2423 it was
5 rejected.

6 MR. COOK: Can I get some coffee?

7 THE COURT: Rejected?

8 MR. GOOLD: 2423.

9 MR. COOK: I didn't understand why Judge Le Chien
10 did that. I recall specifically that he did.

11 THE COURT: Okay.

12 MR. HEPLER: And you didn't use it, so--

13 THE COURT: Okay.

14 MR. COOK: No. I used it. I used it on -- on
15 Campbell, talking -- I asked him what he thought an Ounce of
16 Prevention is Worth a Pound of Cure was and showed him the
17 exhibit, and then when I offered it, Judge Le Chien denied
18 it, but I did use it, so I don't -- I don't know. It's in
19 84A, too.

20 THE COURT: Okay. Let's break with the exhibits.
21 We've worked our way through a hundred and sixty-three
22 exhibits at this point.

23 MR. CRIST: I think actually we're further than
24 that, judge.

1 THE COURT: Yeah.

2 MR. HEPLER: How come we're only on 84, then?

3 THE COURT: It's a mystery of life. All the A, Bs
4 and Cs. Okay.

5 (Court recessed and subsequently reconvened.)

6 (A discussion was held off the record.)

7 MR. CRIST: Judge, one thing, I provided Mr. Cook
8 this morning, at Mr. Stuhan's request, a copy of a tape which
9 is about a minute and a half long, which -- which we propose
10 to use as a demonstrative exhibit in Dr. Barker's
11 examination. It simply shows a bronchoscopy procedure.

12 MR. COOK: I haven't looked at it yet and--

13 MR. CRIST: I don't know if you want to preview it
14 or not, but--

15 MR. COOK: Well, I certainly do.

16 THE COURT: I'll be happy to preview it with you.

17 MR. COOK: Does it have any -- any--

18 MR. CRIST: I don't know. I've never seen it.

19 MR. COOK: --audio?

20 MR. CRIST: I don't know.

21 MR. BARINGER: No, there's no audio.

22 MR. COOK: Oh.

23 THE COURT: Well, we'll sure preview it this
24 morning with Mr. Boyle if we can figure out how to run the

1 tape.

2 MR. COOK: Oh, I can throw it -- flop it in this
3 thing real quick.

4 MR. BOYLE: Don't erase it.

5 (A discussion was held off the record. The judge
6 left and subsequently returned.)

7 (Mr. Hepler and Mr. Goold left at this time.)

8
9 THE COURT: What's his name, again, Mr. Crist?

10 MR. CRIST: Baringer, B-a-r-i-n-g-e-r. Randy
11 Baringer.

12 THE COURT: Has he been admitted?

13 MR. CRIST: He has been reading--

14 THE COURT: Oh, yeah. I recognize him from being
15 in the courtroom. Has he been admitted to practice here?

16 MR. CRIST: He has not been pro hacced in, Your
17 Honor.

18 THE COURT: Are you asking that now?

19 MR. CRIST: No, I'm not moving it as a pro hac
20 admission at this point. It's just simply he will be reading
21 some of the parts and so it will facilitate the preparation
22 of the transcript if he's allowed to do this.

23 THE COURT: I think it's a good idea.

24 MR. COOK: Has he ever been to Seattle?

1 MR. CRIST: He may have been, on the way to
2 Vietnam.

3 Have you?

4 MR. BARINGER: On the way to Korea.

5 MR. CRIST: On the way to Korea.

6 THE COURT: That's okay. Thank you for bringing it
7 to my attention.

8 (A discussion was held off the record.)

9 (Mr. Crist left the courtroom at this time.)

10
11 MR. BOYLE: Your Honor, Defendant Reynolds will
12 file with the court at this time the evidence -- the -- a
13 copy of the transcript of the evidence deposition of Alva
14 Kueper and a copy of the transcript of the evidence
15 deposition of John Kueper, Sr. These were utilized in
16 connection with our discussion on the portions of those
17 depositions that were tendered both by Plaintiff's and
18 Defendant earlier, and I file these so that the record is --
19 so the record contains a complete transcript.

20 THE COURT: Do they need exhibit stickers, or are
21 they sufficient like that?

22 MR. BOYLE: I think if they're just file-stamped
23 and become a part of the court file, that will be sufficient.

24 THE COURT: Fine.

1 MR. BOYLE: Then, Your Honor, I would suggest that
2 we start with one of the short depositions, the one of Gwen
3 Squires.

4 THE COURT: Okay.

5 MR. BOYLE: And I can give to the court or let the
6 court use a copy of this deposition that contains those parts
7 that we have offered.

8 THE COURT: What is Gwen Squires' relationship to
9 the Plaintiff, if any?

10 MR. BOYLE: None, Your Honor.

11 THE COURT: Okay.

12 MR. BOYLE: Wait a minute. Yeah, she's a mother of
13 a childhood friend.

14 THE COURT: Mother of a childhood friend. Okay.

15 MR. BOYLE: Okay.

16 THE COURT: Mr. Cook, are you ready to proceed
17 through this?

18 MR. COOK: Yes, sir. Yes, sir.

19 THE COURT: Could -- they're doing this, I assume,
20 pursuant to Supreme Court Rule 212, where they're electing to
21 read portions of a previously taken evidence deposition, and
22 we'll go into what other portions, if any, need to be read to
23 make it fair.

24 MR. BOYLE: Correct.

1 MR. COOK: I -- I think, Your Honor, that the --
2 that -- if you look at Page 12 -- Page 10, 11 and 12 and 13
3 and that if you rule consistently with your previous ruling
4 on John Kueper, you'll strike that information and then they
5 won't use the deposition.

6 THE COURT: Okay. Since this is a significant
7 issue for the defense, I want -- we'll address it again.
8 I'll -- I'll explain to you why I ruled the other way, and
9 I'd like you to kind of point out to me what you feel the
10 problems are so maybe we can get through it. As I understand
11 it, what you were trying to do was prove up what the general
12 consensus of knowledge was in the United States or in his
13 community at that point in time. United States or just his
14 own community?

15 MR. BOYLE: It's -- well, this -- this goes towards
16 his community.

17 THE COURT: Okay.

18 MR. BOYLE: And I think to set the stage for this--

19 THE COURT: Well, let me just say -- and I will --
20 and I'm not going to cut you off, but I just want to tell you
21 what I was thinking. To do it by just asking individuals
22 that live there during that period of time appears to be an
23 unscientific, highly speculative method of proving that
24 point. Whether that point can be proved by expert testimony

1 would appear to be the only other -- would be -- appear to be
2 the only way it could be proven if it can't be proven this
3 way and assuming it is in fact relevant to the case, which
4 is, I guess, another issue.

5 MR. COOK: Let me further point out for the record,
6 that my client has acknowledged that -- that he heard them
7 called "cancer sticks" and that he knew that they posed
8 health risks.

9 THE COURT: But would you go so far as to stipulate
10 that it was -- what they're trying to prove, it's common
11 knowledge in the community.

12 MR. COOK: No. I'm not going to do that.

13 THE COURT: I didn't think, but I wanted to ask
14 real quick.

15 MR. COOK: No. My client is 12 years old when
16 she's talking about this.

17 THE COURT: Okay. Mr. Boyle, I've cut you off so
18 many times, I want to leave you an opportunity to go ahead
19 and explain it.

20 MR. BOYLE: Okay. Well, first of all, my -- in
21 response -- my problem is I'm a little bit confused as to the
22 posture that Mr. Cook is taking as far as this evidence is
23 concerned. If -- if Charles Kueper, which he has, in fact,
24 admitted that -- that advertising and the failure or the

1 alleged failure of any warning had nothing to do with his
2 smoking, then all -- the allegations in this complaint
3 concerning failure to warn or misrepresentation are gone.
4 And if that's the case, we shouldn't be here. But if the
5 failure to warn claim is still existing, which I submit that
6 it should not be because of what Mr. Kueper judicially
7 admitted of record and also his counsel -- if, in fact, there
8 is a failure to warn claim that exists, then the question
9 becomes, is -- is the general knowledge of the community
10 concerning the health risks of cigarettes during any
11 particular period of time an issue in the case.

12 THE COURT: Okay.

13 MR. BOYLE: Now, if in fact, that is an issue in
14 the case and if there's an alleged failure to warn,
15 obviously, you would have to be, it would go to both the
16 duty, the alleged duty on the part of the Defendant and also
17 to the defenses of contributory negligence, or as the case
18 properly -- now stands, assumption of the risk.

19 THE COURT: Let's assume all that. Is this a
20 competent set -- competent piece of evidence to show that?
21 That's my concern.

22 MR. BOYLE: Yes, it is. So -- so if it's material,
23 then the next question you have to -- you come to, is it
24 relevant to that issue. And relevancy concerns itself, of

1 course, with does it tend to prove or disprove--

2 THE COURT: I'd say it was relevant.

3 MR. BOYLE: --that issue.

4 THE COURT: Okay. I guess I'm more--

5 MR. BOYLE: Yeah. So then we come -- we come --
6 when you consider that question, there would be two ways to
7 show that. You would show that -- that people -- that a
8 certain individual knew -- that lived at that particular
9 period of time knew of the existence of that risk, or you can
10 show by testimony of a person that with -- in relation to
11 that particular period of time, that that person knew the
12 general attitude and the common knowledge of the community--

13 THE COURT: Okay. Two different things.

14 MR. BOYLE: --of the risk.

15 THE COURT: It's two different things. And the
16 only way I -- in thinking of this, it brings me back to
17 testimony with regards to reputation or character. What is
18 that in the community, and the person does not testify as to
19 what they think but what they understand that to be. And if
20 you can approach it from any angle, it would appear to be
21 that, not as individual thought. Do you know what I--

22 MR. BOYLE: Well, that -- that is somewhat
23 analogous, although it's not entirely analogous, and the
24 reason for that is this: that if the -- if the failure to

1 warn is an issue in the case and if the knowledge of the
2 community -- obviously the knowledge of the community at the
3 time is relevant because that goes to duty and defenses.
4 Now, how do you prove the knowledge of the community? Well,
5 you can prove that by putting on people that testify what
6 they knew or didn't know. You can also prove that by -- by
7 putting on people that say, "I know what -- I knew at that
8 time and I know" -- strike that. "I know" -- you can put on
9 people that say that, "At that period of time, I was there.
10 I had contact with the general public, and I knew what the
11 general public knew." And put it on that way as common
12 knowledge of the community. And we have -- we intend to
13 offer that in both of those fashions. It's already in with
14 respect to certain witnesses and the certain witnesses'
15 knowledge of the risk that existed at a certain time. And
16 there's case support for that, Your Honor.

17 THE COURT: Okay. I'd like to -- okay.

18 MR. BOYLE: There's the Hanlon case.

19 THE COURT: Okay.

20 MR. BOYLE: Let me give a copy of that--

21 THE COURT: Thank you.

22 MR. BOYLE: --to the court and I'll give a--

23 MR. COOK: Thank you.

24 MR. BOYLE: --copy to Mr. Cook. And I would like

1 to refer the court to page -- that is Hanlon, H-a-n-l-o-n,
2 vs. Airco Industries. It's a 1991 First District case. I
3 would like to refer to the court to Page 1143 of that
4 Northeastern opinion, Headnote 11.

5 THE COURT: Go ahead.

6 MR. BOYLE: Okay. In that case there were two --
7 it allowed -- the court allowed two witnesses, not the
8 Plaintiff -- not the decedent or not the Plaintiff, to
9 testify concerning whether a particular piece of equipment
10 that was alleged to be the defective product -- the court
11 allowed them to testify that they knew of the dangerous
12 condition of that machine.

13 THE COURT: Hm.

14 MR. BOYLE: And the court said that that went to
15 the issue of the defendant's assumption of the risk and of
16 course it would also go to the issue of -- of a duty to warn
17 or a duty to -- to correct any defect or whatever the
18 additional charge might be in any particular product
19 liability case. But even apart from that case, it -- there's
20 no other way to do it, it seems to me, and the evidence has
21 to come in because it's probative.

22 MR. COOK: Hearsay never has to come in because
23 it's probative. And -- and the -- the fact that this woman
24 may have known that when my client was 13 years old is not

1 evidence of the fact that my client knew it. Now--

2 THE COURT: But it's surely not hearsay. They're
3 not trying to prove that cigarettes are cancer sticks.

4 MR. COOK: They are in fact. They're trying to --
5 to -- then what are they trying to prove? Notice to my
6 client?

7 THE COURT: I think that's -- isn't it -- is it?
8 What are you trying to prove?

9 MR. BOYLE: We're trying to prove that -- that
10 would be one of the things that we're trying to prove, that
11 there would be notice to his client. The other thing we
12 would be trying to prove is there's no duty on the part of
13 the Defendant to warn because it was within the common
14 knowledge of the community, and we can -- we can also prove
15 of the community in Springfield where this gentleman grew up,
16 that -- of the hazards -- alleged hazards of cigarette
17 smoking.

18 THE COURT: Okay. I'm sorry, Mr. Cook. I
19 interrupted, but I did want to get that point correct, what
20 they were proving.

21 MR. COOK: See -- see -- see, the point is, Your
22 Honor, it's their duty to warn. Now, if they can -- if they
23 have evidence that my client knew when he was a child what
24 this lady says, that cigarette smoking could cause lung

1 cancer, they're trying to prove themselves that cigarette
2 smoking causes lung cancer. Now -- which is -- which is a
3 very, very strange position for them to do, but if you would
4 look at Plaintiff's Exhibit Number 4, you will see that that
5 is one of their practices, and that is, to create doubt about
6 the health charge without actually denying it. What they do
7 -- what they're doing here is an oxymoron in their defense
8 and -- and -- and it's confusing. They're trying to prove
9 that cigarette smoking causes cancer and that everybody knows
10 that by this lady. They aren't -- they aren't trying to
11 prove that my client knew this. My client was a child then.

12 THE COURT: Uh-huh.

13 MR. BOYLE: We're not trying to prove that
14 cigarettes cause lung cancer.

15 MR. COOK: You are, too.

16 MR. BOYLE: We're trying to prove that -- the state
17 of the knowledge of the community at the time with reference
18 to the knowledge of the -- of the alleged risk.

19 MR. COOK: If cigarette smoking doesn't cause
20 cancer, how the heck can -- why is there any duty on my
21 client not to smoke? You can't do both of those things. You
22 can't say on one hand, "Cigarette smoking causes cancer, but
23 you know it causes cancer; therefore, you shouldn't smoke."

24 MR. BOYLE: Well, you're addressing two different

1 issues.

2 MR. COOK: No -- I know, and so are you. You're
3 addressing three or four.

4 THE COURT: Let's go back to the legal issue again.
5 Have you had a chance to look at this paragraph in this case?

6 MR. COOK: Yes.

7 THE COURT: It actually appears that they're asking
8 the opinion of two other people to -- to reflect on what the
9 subjective state of mind of the defendant was, which
10 surprises the heck out of me.

11 MR. COOK: Well, I'd point out in the last sentence
12 in there, therefore -- the only thing that they say in this
13 was, is that -- the judge didn't abuse his discretion in
14 allowing it. They never said that it was proper.

15 MR. BOYLE: There's more--

16 THE COURT: They referred to it as a specious
17 objection.

18 MR. BOYLE: Well, judge, the issue of duty to warn
19 goes more than just to the subjective state of mind of the
20 Defendant -- or of the Plaintiff, I mean, because there's no
21 duty -- obviously there's no duty to warn of a risk that's
22 common knowledge in the community. I mean, that -- of course
23 we can all agree to that.

24 MR. COOK: Well, but see--

1 THE COURT: Well, that isn't why they offered it
2 still. I don't like your concept there. I really think you
3 got a troublesome evidentiary issue. I think it's a lot more
4 like reputation and character than it is anything close to
5 what you're doing. And you're saying what they specifically
6 knew, not what the knowledge in the community was. I think
7 you got a problem with that argument. It might come in under
8 assumption of the risk, which was what this case says.

9 MR. BOYLE: Well, then if it comes in under
10 assumption of the risk, it would come in under contributory
11 negligence, also.

12 MR. COOK: I don't understand how -- how you think
13 that you can go ahead and ask this lady what -- what -- what
14 general knowledge is about--

15 MR. BOYLE: Well, judge, how do you -- let's take
16 -- I don't necessarily agree that this is exactly analytical
17 to a reputation in the community.

18 THE COURT: Yeah.

19 MR. BOYLE: But certainly evidence is admissible of
20 a person -- of a party's reputation in the community for
21 truth and veracity. Now, how do you prove that?

22 MR. COOK: I don't have any objection to you asking
23 her, "Did you know in 1953 that cigarette -- that there was a
24 risk of smoking -- of cancer from smoking cigarettes?" That

1 would be how you would prove what the general knowledge in
2 the community is, not what she thinks it is, but what she in
3 fact knows and what others know, and indeed, you have
4 already, as you point out, done that -- or as I pointed out,
5 done that by asking Charlie if he ever heard of cigarettes
6 being referred to as "cancer sticks," which he said, "Yes."

7 MR. BOYLE: Well, now I guess--

8 MR. COOK: But this lady is not an expert witness
9 on what the community knew, nor have you tendered her as
10 such, I might add--

11 MR. BOYLE: Well, I don't have to tender her as an
12 expert because she's testifying to a fact. She's testifying
13 as to a fact of what the community knowledge was at that
14 particular period of time. Now, from what Mr. Cook has just
15 said, I understand now that he's backing away from his
16 objection--

17 MR. COOK: No, I'm not backing away at all.

18 THE COURT: Go ahead.

19 MR. BOYLE: Your Honor, may I please be able to
20 make this record without being interrupted?

21 MR. COOK: No, you're not making a record. You're
22 making an argument. You always make that mistake. Your --
23 your -- your record is the objection or the offer.

24 THE COURT: You can complete your--

1 MR. BOYLE: Hm. I thought my record was everything
2 I said.

3 THE COURT: I don't know. I know--

4 MR. COOK: No, it isn't. You've always thought
5 that. You've bored me to tears over the years thinking that.

6 MR. BOYLE: Well, that might be, but -- I'm sorry
7 about that, but it doesn't make any difference.

8 THE COURT: Mr. Boyle, finish your thoughts and
9 then--

10 MR. BOYLE: Because from what Mr. Cook just said, I
11 understand now that he's not-- he's no longer objecting if we
12 put on individual testimony that some individual, such as
13 John Kueper, knew the hazards of cigarettes at a particular
14 period of time. What he's now objecting to is a -- a witness
15 that we put on that can testify to the knowledge of the
16 community at that particular period of time.

17 THE COURT: Well, I kind of understood the opposite
18 of that statement.

19 MR. BOYLE: Well, which is it? I mean, I'd like to
20 know which it is so I know what I have to argue against.

21 THE COURT: Let me do this, I'm going to -- can I
22 have the next one of these, too, just might--

23 MR. COOK: Why don't you give him the three small
24 ones: Lane, Graham and--

1 THE COURT: Let me read all three of them and let
2 me study this opinion you've given me. You have surprised me
3 with this case. I -- I mean a good surprise. I mean I just
4 wasn't aware of this case.

5 MR. BOYLE: Your Honor, I don't know how else you
6 prove the general knowledge in the community unless you put
7 on witnesses that are able to testify about it.

8 MR. COOK: You put on people who testify as to
9 specific knowledge.

10 THE COURT: As to specific knowledge?

11 MR. COOK: Right. To what my client knew.

12 THE COURT: Okay.

13 MR. BOYLE: Your Honor, I will give you--

14 THE COURT: Give me the next couple of them and let
15 me--

16 MR. COOK: You know, I mean, one of the ways that
17 you would prove this, I would think, is that you could -- if
18 you really want to know how to do it, you could call -- prove
19 up his curriculum that they taught when he was in high school
20 with respect to smoking and health, because that would be
21 something that he should have been aware of. The fact that
22 this woman, who is not an expert witness, says that she
23 thinks something is general knowledge, is not admissible
24 against my client in this case.

1 THE COURT: Okay.

2 MR. BOYLE: I'll give these to you, Your Honor, if
3 I can have them back. Is that okay?

4 THE COURT: Yeah.

5 MR. BOYLE: Because they're marked ready to be
6 read.

7 THE COURT: Okay.

8 MR. BOYLE: Okay?

9 THE COURT: Let me work on this for a while. This
10 -- off the record, Maureen.

11 (A discussion was held off the record. Court
12 recessed.)

13 * * * * *

14 (The following proceedings were reported by Donna
15 Brewer, Official Court Reporter, Illinois CSR 084-
16 002549, RPR.)

17 (The following proceedings were held in open court
18 in the presence and hearing of the jury.)

19 THE COURT: Mr. Crist, could you please call your
20 next witness?

21 MR. CRIST: Yes, your Honor. At this time
22 Defendant Reynolds would call Mr. Yancey Ford.

23 THE COURT: Mr. Ford. Please come forward.

24 YANCEY FORD

1 being called as a witness, having been first duly sworn,
2 testified as follow:

3 THE COURT: Watch your step around that way. And
4 then, if you will, take a seat over here.

5 DIRECT EXAMINATION

6 BY MR. CRIST:

7 Q. Mr. Ford. Would you please state your name for the
8 record, sir?

9 A. Yancey William Ford, Jr.

10 Q. And, Mr. Ford, where do you live?

11 A. [DELETED]

12
13 Q. Mr. Ford, will you tell the jury by whom you are
14 employed?

15 A. R.J. Reynolds Tobacco Company in Winston-Salem.

16 Q. And how long, Mr. Ford, have you been employed by
17 Reynolds?

18 A. Thirty years and seven months.

19 Q. Mr. Ford, what is your current position at
20 Reynolds?

21 A. I am Executive Vice President of Sales.

22 Q. Mr. Ford, Mr. Cook has previously shown to this
23 jury an exhibit which has been marked as Plaintiff's Exhibit
24 62. Let me hand that to you.

1 Your Honor, I would like to display page 2 of that
2 to the jury if I may.

3 THE COURT: Any objection?

4 MR. COOK: No, sir.

5 THE COURT: Please do so.

6 Q. (By Mr. Crist) Are you familiar, Mr. Ford, with
7 what has been marked as Plaintiff's Exhibit 62?

8 A. Yes, I am.

9 Q. And especially with respect to page 2, are you
10 familiar with this?

11 A. Yes, sir.

12 Q. Is this the kind of thing, Mr. Ford, which would
13 reach you in the ordinary course of business?

14 A. No, it is not.

15 Q. Did this, however, Mr. Ford, come to your
16 attention?

17 A. Yes, it did.

18 Q. And do you recall approximately when that was?

19 A. I really am not -- it was sometime later than
20 January. I wrote a letter following up to this. If you have
21 that letter, I can tell you the exact date.

22 Q. Okay. Why don't we come back to that in a second,
23 Mr. Ford? When this came to your attention, Mr. Ford, what
24 was your reaction?

1 A. Well, I was very, very upset. I was mad because it
2 didn't reflect my position. It certainly didn't reflect the
3 company's position. And it was very embarrassing in terms of
4 the specifics mentioned in there.

5 Q. Mr. Ford, you indicated that you had written a
6 piece of correspondence after this came to your attention?

7 A. Yes, sir.

8 Q. I would like to show you, Mr. Ford, what has
9 previously been marked as Defendant Reynolds' Exhibit 234.

10 THE COURT: Thank you.

11 Q. (By Mr. Crist) Is this, Mr. Ford, a copy of the
12 letter to which you referred a minute ago?

13 A. Yes, it is. So I received --

14 Q. Okay.

15 A. I received --

16 Q. Does it bear your signature, sir?

17 A. Yes, it does.

18 MR. CRIST: Your Honor, I move into evidence what
19 has been premarked as Defendant Reynolds' Exhibit 234.

20 THE COURT: Any objection?

21 MR. COOK: I object. It's hearsay.

22 THE COURT: For what reason are you moving for its
23 admission?

24 MR. CRIST: Your Honor, I am moving it into

1 evidence as substantive evidence. This is a letter which Mr.
2 Ford has identified and which he has attested to that he
3 wrote.

4 THE COURT: Okay. It's an out-of-court statement
5 offered for the truth of the matter asserted.

6 MR. CRIST: But we have the witness here in court,
7 your Honor, who wrote this statement.

8 MR. COOK: Is it being asked -- past recollection
9 recorded?

10 THE COURT: He can testify as to the content of it,
11 but technically it is hearsay. I don't care if he is in the
12 courtroom or not. He can testify to everything that is
13 contained in it.

14 MR. CRIST: I offer it, your Honor --

15 THE COURT: He can testify that he prepared it.

16 MR. CRIST: I offer it then as a business record.

17 THE COURT: Okay. Then you will -- we will just
18 lay the foundation for the business record --

19 Q. (By Mr. Crist) Mr. Ford --

20 THE COURT: -- unless you don't object to it being
21 admitted as a business record.

22 MR. CRIST: I don't object to it being a business
23 record.

24 THE COURT: Okay. It's admitted then. Plaintiff's

1 Exhibit -- I'm sorry. R.J. Reynolds' 234 admitted.

2 (Defendant R.J. Reynolds' Exhibit No. 234 was
3 received into evidence.)

4 THE COURT: Go ahead.

5 MR. CRIST: Your Honor, with permission of the
6 Court, I would like to display it to the jury.

7 THE COURT: Yes, sir.

8 Q. (By Mr. Crist) Mr. Ford, you indicated that this
9 document would permit you to date when it is that you
10 received what was previously marked as Plaintiff's Exhibit
11 62.

12 A. Yes, sir.

13 Q. How is that, Mr. Ford?

14 A. Well, as soon as I received that, in 24 hours I had
15 written this particular letter and -- to All Field Sales
16 Employees.

17 Q. Now, Mr. Ford, I want to come back to it in a
18 second. But is it common for you to write letters to all of
19 your field sales employees?

20 A. No, sir, it is not.

21 Q. When do you do so?

22 A. It's only in very serious situations, situations
23 where I really want to get across a point. When they hear
24 from me, I want it to have some kind of impact and mean

1 something. I guess I may send out four letters a year --

2 Q. And did you want --

3 A. -- as an example like this.

4 Q. And did you want this to have an impact and to mean
5 something?

6 A. Yes, sir.

7 Q. Okay. Now, Mr. Ford, I would like you, if you
8 would, to read to the jury what it is that you wrote to All
9 Field Sales Employees on April 10, 1990.

10 A. Okay. "It is our long-standing and firmly-held
11 view at R.J. Reynolds Tobacco Company that smoking is an
12 adult custom. Our policy is to promote and market our
13 product only to adult smokers primarily those who smoke
14 competitive brands.

15 It has come to our attention that our current sales
16 strategy against Marlboro was misinterpreted in one of our
17 166 sales divisions. As a result, our sales representatives
18 in that division were apparently asked to identify retail
19 calls near high schools for the purpose of maintaining
20 ongoing promotions in these stores.

21 Actions of this nature are in clear violation of
22 our policy and will not be tolerated. Corrective action has
23 been taken in the involved division. And once again, I want
24 to reinforce our policy that we promote our products only to

1 adult smokers.

2 Retail stores near high schools should be given no
3 special emphasis and should be worked with the normal course
4 of frequency and with the same programs you would give any
5 other similar outlet regardless of location.

6 Please give this matter your immediate attention
7 and high priority. Sincerely, Yancey W. Ford, Jr., Executive
8 Vice President - Sales."

9 Q. Now, Mr. Ford, in addition to issuing to all field
10 sales employees what has been marked as Defendant Reynolds'
11 Exhibit 234 --

12 A. Yes, sir.

13 Q. -- did you do anything else?

14 A. Yes. As soon as I received this letter anonymously
15 in the mail on April 9, I immediately called my six area Vice
16 Presidents. So we have the country divided into six parts.
17 The six Vice Presidents report directly to me. I asked them
18 had they given any direction of this nature. I was informed
19 they had not. I then asked them to proceed to the next level
20 which is our regions. We have 32 of those and to determine
21 if, in fact, there was any direction coming out of the
22 regions to this effect. They informed me also.

23 My instructions were to also take this down to the
24 division level which at this time we had 166 and to find out

1 if any instructions had been given to our sales people to do
2 this and to report back to me any correspondence or any
3 infractions that would involve anything of this nature.

4 Q. Okay. We'll come back to that in a second, Mr.
5 Ford, if we can. For a moment I want to return to Defendant
6 Reynolds' Exhibit 234. And in this letter you indicate, Mr.
7 Ford, that corrective action has been taken in the involved
8 division.

9 A. Yes, sir.

10 Q. Can you specifically tell the jury what that was?

11 A. That was -- it was a division manager. His name
12 was Jim McMahon. And we placed that individual on a
13 reprimand for violating our policy.

14 Q. Mr. Ford, let me hand you what has been premarked
15 as Defendant's Exhibit 235 and ask you if that is a copy of
16 the reprimand.

17 A. Yes, sir, it is.

18 MR. CRIST: 235.

19 THE COURT: Okay.

20 MR. CRIST: Your Honor, I move this into evidence
21 as Defendant Reynolds' Exhibit 235.

22 MR. COOK: No objection, your Honor.

23 THE COURT: Admitted.

24 (Defendant R.J. Reynolds' Exhibit No. 235 was

received into evidence.)

MR. CRIST: Your Honor, I would like to display this to the jury, if I may.

THE COURT: You may.

Q. (By Mr. Crist) Mr. Ford, would you read to the jury, please, what has been marked as Defendant Reynolds' Exhibit 235 and admitted into evidence as such?

A. Okay. This is dated April 11, 1990. It's to J. P. McMahon, a Division Manager. It is from D. C. Turner who is a Regional Sales Manager in our South Florida Region. The 2300 refers to the number of the region. The subject is Written Reprimand.

"The purpose of this written reprimand is to document the poor judgment exercised by you on January 10, 1990, in your division to issue the attached letter to all Division Sales Representatives requesting them to identify all stores in their assignments which are in close proximity to high schools.

The implication of your letter is that the company will now start targeting high school students for promotions of our products. The implication is in direct conflict with the company's long-standing policy of not marketing or promoting our products to minors. Company policy explicitly states that, 'There must be no exception to this policy at

1 any times for any reasons under any circumstances.'

2 You need to understand that the mere implication
3 that the company is in any way targeting high school students
4 as a market indicates a serious lack of judgment on your
5 part, a lack of understanding of company policy as well as a
6 lack of sensitivity to the rationale underlying our company
7 policy and these issues.

8 I am instructing you to take the following
9 corrective action:

10 Immediately clarify in writing to all Division
11 personnel that our intent was not to target high school
12 students. Instead our strategy was to target retail outlets
13 that are frequented by adult Marlboro smokers.

14 Ensure that retail outlets in close proximity to
15 high schools are not receiving special emphasis with regard
16 to quantity of promotional items and call frequency.

17 Any future situation indicating a similar lack of
18 judgment on your part will result in further disciplinary
19 action up to and including termination.

20 As of this date, April 11, 1990, I have discussed
21 this report with you and you have been given the opportunity
22 to read the report and attach any comments which you have
23 concerning this report. It is understood that this report
24 will remain on file in the office and you are being issued a

1 copy of same."

2 And it's signed -- the manager's signature is David
3 C. Turner, dated 4/11; employee's signature, J. P. McMahon,
4 also dated on 4/11 and then the employee's Social Security
5 number along with the employee's account number and copy of
6 it to the Sales Personnel Department in Winston-Salem and
7 also a copy to Mr. J. W. Best who is an area Vice President
8 for the southeastern part of the U.S.

9 Q. Now, Mr. Ford, following the issuance of the
10 reprimand to Mr. McMahon on April 11 of 1990, did he respond
11 to that?

12 A. Yes, he did.

13 Q. And is his response maintained as well in his
14 personnel folder?

15 A. Yes, sir.

16 MR. CRIST: Your Honor, I would like to show the
17 witness what has been previously marked, premarked as
18 Defendant Reynolds' Exhibit 236. Your Honor, I move into
19 evidence what has been marked as Defendant Reynolds' Exhibit
20 236.

21 THE COURT: Any objection?

22 MR. COOK: No, sir.

23 THE COURT: Admitted.

24 (Defendant R.J. Reynolds' Exhibit No. 236 was

1 received into evidence.)

2 MR. CRIST: Your Honor, I would like to display it
3 to the jury, if I may.

4 THE COURT: Yes.

5 Q. (By Mr. Crist) Mr. Ford, is this a copy of a cover
6 memo in Mr. McMahon's response?

7 A. Yes, sir, it is.

8 Q. And does the cover memo indicate that you received
9 a copy?

10 A. Yes, sir, it does.

11 Q. Let me put, if I can, the first page. Mr. Ford,
12 would you like to try to decipher or would you like me to?

13 A. Either way. If you want to do it, you may.

14 Q. Why don't you give it a try and I will help out as
15 best I can?

16 A. Okay. This is dated 5/1/90. It's to D. C. Turner.
17 And the subject is Corrective Action Dated April 11, 1990.

18 "Dear Dave, The purpose of this letter to you is
19 to add my feelings and comments regarding the written
20 reprimand I was issued on the above date. On this date I was
21 asked to read, sign and return by facsimile, a copy of the
22 written reprimand issued to me on this date. As requested, I
23 signed and returned this document deciding at the time not to
24 add any comments due to uncertainties I had.

1 In January of this year, I found my --"

2 Q. -- myself --

3 A. "myself --"

4 Q. -- inspired --

5 A. "-- inspired with the renewed sense of enthusiasm
6 with our company's decision to gain share of market by
7 targeting the young adult market with numerous promotions
8 geared toward the Marlboro smoker. A lot of the enthusiasm
9 stemmed from our Atlanta Sales Manager's meeting and our
10 upcoming meeting with our sales reps."

11 Q. Hang on a second while I put up page 2.

12 A. "However, these past weeks have left me with many
13 sleepless nights and a deep sense of regret that a letter
14 dated January 10, 1990, to my field sales reps was taken out
15 of context due to references I made to high school aged
16 students and identifying stores for placement of our premium
17 items. I would like to clarify this letter by saying it was
18 not my intention for my sales force to recruit young high
19 school age students to smoke. I strongly believe smoking
20 should be an adult decision and that the sales division does
21 not encourage young kids to smoke or even to offer our brands
22 to anyone under 21 years of age. My intention was to simply
23 identify stores with a large concentration in Marlboro
24 smokers.

1 I might add I have never asked my sales force to do
2 anything special in any store where a large percentage of
3 young adults smoke. By that I mean, we do not encourage
4 consumer offers, extra visits to the store for premium usage
5 or anything else that would be construed toward influencing
6 young people to smoke.

7 I further stand in full agreement with RJR's
8 policies looking out for the rights of all age groups until
9 they have a right to make their own decision whether to smoke
10 or not to smoke. I accept responsibility for my actions and
11 would like this company to know that I agree with and adhere
12 to these policies".

13 Q. I will put page 3 up.

14 A. "In closing, I must say I am very --" is that
15 concerned -- I believe -- "about the way my letter was
16 interpreted. I'm sorry this had to come to this. Looking
17 back at our annual meeting held in February with my sales
18 force, I did not give my -- I did not give any special
19 emphasis to promoting our brands to high school students.
20 Rather, our emphasis was on gaining business from young adult
21 Marlboro smokers through our pack promotions.

22 Being both a parent of two girls and coming into
23 contact with a large number of high school aged kids through
24 my softball umpiring and coaching endeavors, I have never

1 encouraged kids to smoke or even to persuade young adults to
2 try our brands. Furthermore, I totally disassociate myself
3 from wearing any cigarette brand apparel when I am around the
4 kids so that it does not look like I am endorsing smoking.

5 Again I would like to apologize for my reference to
6 high schools in my letter dated 1/10/90. It was a mistake on
7 my part and I deeply regret it. Sincerely, James P.
8 McMahon."

9 Q. Now, Mr. Ford, the document -- can you pull up the
10 document which is previously marked as Plaintiff's Exhibit
11 62?

12 A. I'm sorry. Would you --

13 Q. Plaintiff's Exhibit 62.

14 A. Yes, sir.

15 Q. There is a cover sheet on there from an anonymous
16 person, is that right?

17 A. Yes, sir.

18 Q. And it appears to be addressed to Dr. Louis
19 Sullivan?

20 A. Yes, sir.

21 Q. Okay. Do you know whether Dr. Sullivan ever
22 received a copy of this?

23 A. I do not know that.

24 Q. Did Reynolds ever hear from Dr. Sullivan?

1 A. We did not.

2 Q. Now, did you take the actions which you have
3 described here to the jury only because a copy of this letter
4 purports to have been sent to Dr. Sullivan?

5 A. No, I did not. This was a clear violation of what
6 we stand for. And that was the reason. It had nothing to do
7 -- I don't know whether Dr. Sullivan ever received it.

8 Q. But you have --

9 A. But it was not our policy to do this. And like I
10 said, I was pretty infuriated and mad about someone using
11 this poor judgment to do something like this.

12 Q. Would you have done anything differently if it
13 didn't purport to have been sent to Dr. Sullivan?

14 MR. COOK: Well, your Honor, that is calling for
15 conjecture. Well, I don't care. I will withdraw the
16 objection.

17 THE COURT: Okay. You may answer.

18 THE WITNESS: No, I would not have.

19 Q. (By Mr. Crist) Now, Mr. Ford, you indicated a
20 minute ago that following your receipt of what has been
21 marked as Plaintiff's Exhibit 62 on April 9 that you sent a
22 letter to the Field Sales Force on the following day.

23 A. Yes, sir.

24 Q. And that you also talked to your vice -- Area Vice

1 Presidents and had them go on down to their subordinates?

2 A. Yes, sir, that is correct.

3 Q. As a result of that effort, I think you testified a
4 minute ago, Mr. Ford, that out of the 162 sales divisions you
5 found another violation.

6 A. 166, I believe it is.

7 Q. Out of the one hundred sixty whatever --

8 A. Yes, I did.

9 Q. You found another violation?

10 A. Yes, sir, I did.

11 Q. Mr. Ford, I would like to show you what was
12 previously marked as Plaintiff's Exhibit 19H.

13 A. Okay.

14 Q. Is that the violation to which you referred?

15 A. Yes, it is.

16 Q. And out of what division did that come?

17 A. That was in Oklahoma City. The address was Moore,
18 Oklahoma, but it's actually Oklahoma City.

19 Q. Now, as a result of uncovering this violation, what
20 did you do?

21 A. We took the same action with this gentleman that we
22 took with Mr. McMahon. He was given a reprimand.

23 Q. Mr. Ford, I would like to show you what has been
24 premarked as Defendant's Exhibit 237. Is 237 a copy of that

1 reprimand?

2 A. Yes, sir, it is.

3 Q. And is this maintained in the ordinary course of
4 business at Reynolds?

5 A. I'm sorry. I didn't --

6 Q. Is this kept in the ordinary course of business at
7 Reynolds?

8 A. Yes, sir.

9 Q. In Mr. Warlick's personnel file?

10 A. It is indeed.

11 MR. CRIST: Your Honor, I move into evidence what
12 has been marked as Defendant Reynolds' Exhibit 237.

13 MR. COOK: No objection.

14 THE COURT: Admitted.

15 (Defendant's R.J. Reynolds' Exhibit No. 237 admitted
16 into evidence.)

17 MR. CRIST: Your Honor, I would like to display it
18 to the jury.

19 THE COURT: Proceed.

20 Q. (By Mr. Crist) Mr. Ford, is what has been marked as
21 Defendant's Exhibit 237 essentially the same in text and
22 substance as the reprimand which was issued to Mr. McMahon?

23 A. Yes, sir, it is.

24 Q. Now -- excuse me just a second. Mr. Ford, the

1 reprimand in here refers to -- in the first paragraph to
2 April 5, 1990.

3 A. Yes, sir.

4 Q. Okay. And that is the date of Mr. Warlick's letter
5 which has been marked as Plaintiff's Exhibit 19H?

6 A. Yes, sir.

7 Q. Okay. Did you, Mr. Ford, after discovering this
8 additional violation in another of the hundred sixty some
9 sales districts issue another letter countermanding this to
10 the sales force?

11 A. No, sir.

12 Q. Why not?

13 A. I had already just written one on April 10.

14 Q. So -- you actually wrote one five days after this?

15 A. Yes, sir.

16 Q. Now, what has been marked as Defendant Reynolds'
17 Exhibit 237 indicates, Mr. Ford, that Mr. Warlick was
18 instructed to immediately clarify in writing to his division
19 sales personnel that a mistake had been made?

20 A. Yes, sir.

21 Q. And, to your knowledge, was that done?

22 A. Yes, sir.

23 Q. Let me show you, Mr. Ford, what has been premarked
24 as Defendant Reynolds' Exhibit 238.

1 MR. CRIST: Your Honor, for the record, this
2 document was previously marked as Plaintiff's Exhibit 19I,
3 but was not shown to the jury and has been withdrawn by Mr.
4 Cook.

5 THE COURT: Okay.

6 MR. COOK: Which?

7 MR. CRIST: The one I just gave you.

8 Can I get the number of that please, Mr. Ford?

9 Your Honor, I would move into evidence what has
10 been marked as Defendant Reynolds' Exhibit 238.

11 THE COURT: Any objection?

12 MR. COOK: (Indicating no.)

13 THE COURT: Admitted.

14 (Defendant R.J. Reynolds' Exhibit No. 238 was
15 admitted into evidence.)

16 Q. I would like to display, your Honor, what has been
17 marked as Defendant Reynolds' Exhibit 238 to the jury.

18 THE COURT: You may.

19 Q. (By Mr. Crist) Mr. Ford, would you read to the jury
20 the first three paragraphs of what has been marked as
21 Defendant Reynolds' Exhibit 238?

22 A. Okay. To: All South Oklahoma City Division Sales
23 Personnel. The subject is Correction to Guidelines in
24 Classifying Marlboro Targeted Retail Accounts.

1 "Ladies and gentlemen: In my letter to you dated
2 April 5, 1990, you were given instructions and criteria for
3 identifying Marlboro Targeted Retail Accounts, with emphasis
4 on calls in the vicinity of high schools and college
5 campuses.

6 As our company's intent is and always has been to
7 promote our products to adult smokers only, retail calls
8 frequented by under aged consumers and high school students
9 would not meet our guidelines and policy for promotion of our
10 cigarette brands.

11 Additionally, retail outlets located close to high
12 schools will not receive any special emphasis with regard to
13 the quantities of promotional items offered, nor will the
14 frequency of these accounts be increased above normal call
15 class frequency guidelines given to you at our 1990 Annual
16 Sales Plan Meeting."

17 MR. CRIST: Thank you, Mr. Ford. Your Honor, I
18 have nothing further.

19 THE COURT: Cross examination -- excuse me. Direct
20 examination, Mr. Hepler?

21 MR. HEPLER: None, your Honor.

22 THE COURT: Mr. Nester?

23 MR. NESTER: No, your Honor.

24 THE COURT: Cross examination, Mr. Cook?

1 MR. COOK: Yes, sir.

2 CROSS EXAMINATION

3 BY MR. COOK:

4 Q. Mr. Ford, I take it that you wouldn't approve of a
5 promotion where a large number of children are going to be
6 exposed to cigarettes, advertising things like that?

7 A. Yes. I would approve of promotions in retail
8 outlets would where some children may be, but not on a
9 college campus or certainly not on a high school playground.

10 Q. Near a high school doesn't mean that everybody in
11 there is going to be high school students.

12 A. Yes, sir. I understand what you are saying.

13 Q. You don't have -- the reason that -- I mean what is
14 the problem here? Is the problem just the way you look or is
15 there a problem about exposing kids to cigarette promotions?

16 A. I am not sure I --

17 Q. Well, I mean is this just a cosmetic thing or are
18 you actually concerned out of some decency or ethical
19 consideration that children shouldn't be exposed to cigarette
20 promotions?

21 A. We don't encourage children to smoke our products.
22 We don't think they should and it is our policy.

23 Q. I know that's your policy or at least you say it's
24 your policy. What I am asking you is that --

1 MR. CRIST: Objection, your Honor, argumentative.

2 THE COURT: Sustained as to argumentative.

3 Continue with your questions.

4 Q. (By Mr. Cook) What I am saying, sir, is there some
5 ethical reason why you don't do that or is that -- or did you
6 simply reprimand these people because they broke a rule or
7 did they do something wrong?

8 A. They broke a rule. And that policy was that we do
9 not promote to kids.

10 Q. They just broke -- they didn't do anything wrong.
11 They just broke one of your company's rules?

12 A. That's exactly right.

13 Q. There isn't anything that is inherently wrong in
14 your mind with soliciting children to smoke other than the
15 fact that it may be against the law or your -- it would be
16 against your company policy. But there is nothing wrong with
17 kids smoking, is there?

18 A. Sure.

19 Q. What's wrong?

20 A. I don't think they should. I mean my conscience
21 wouldn't allow me to do that.

22 Q. Well, see the problem that I have is -- you know,
23 you thought when you wrote that letter on April 10 that Louis
24 Sullivan had a copy of it, didn't you?

1 A. I had no idea of knowing whether he did or didn't.

2 Q. Well, your copy was the second page -- the letter
3 that Mr. McMahon wrote was attached to a letter to Louis
4 Sullivan, wasn't it?

5 A. Yes, sir, it was.

6 Q. May I see --

7 A. Yes, I have got it.

8 Q. -- Plaintiff's Exhibit No. 62?

9 A. Sure can. Hold just one minute. Excuse me.

10 MR. COOK: Your Honor, I would move in the entirety
11 Plaintiff's Exhibit No. 62.

12 THE COURT: Any objection?

13 MR. CRIST: Yes, your Honor. We took that up just
14 before noon. Same objections.

15 THE COURT: Under -- what theory are you moving it
16 in now?

17 MR. COOK: Well, I am moving it in -- he acted on
18 the basis of receiving this letter. That's a portion of the
19 letter, the fact that he was aware of the letter to Sullivan.

20 THE COURT: Okay. The first page does not come in
21 as a business record. It doesn't meet the foundational
22 requirements. You can utilize the letter to show why he
23 acted in a certain way.

24 MR. COOK: Yes, sir. That's why --

1 THE COURT: Well, it's admitted for the limited
2 purpose of showing why he took certain action. It's not
3 admitted substantively as a business record would be.

4 Q. (By Mr. Cook) The -- Plaintiff's Exhibit No. 62 was
5 attached to a letter -- whoops, that's not 62. That's 19H.

6 MR. CRIST: We had that same confusion before. I
7 think it's this one.

8 Q. (By Mr. Cook) Plaintiff's Exhibit No. 62 was the --
9 is an attachment of a letter that you received that was
10 addressed to Louis Sullivan. Is that true?

11 A. It was addressed, yes, sir.

12 Q. And that letter said, did it not, "Dear Dr.
13 Sullivan, I am enclosing a copy of a letter sent to the
14 employees of R.J. Reynolds Tobacco. As you can see, these
15 people are being instructed to seek out places where kids
16 congregate before and after school in order to promote
17 smoking by offering a free item as an enticement to purchase
18 one of their brands.

19 I am sending Reynolds a copy of this letter in hope
20 that they will put an end to this policy. I look forward to
21 seeing what your office will be doing about that. Thank you,
22 Concerned and Upset."

23 That's what you received. You received this?

24 A. Yes, sir.

1 Q. And then this on the second page?

2 A. That's correct.

3 Q. What is marked out here?

4 A. I have no idea.

5 Q. Why don't you?

6 A. It was that way when I received it.

7 Q. Well, but I mean did you ask Mr. McMahon for a copy
8 of the original letter he sent?

9 A. I think we did, yes, sir.

10 Q. Did he have one?

11 A. Yes, I believe he did.

12 Q. Did you -- but you don't recall what was marked out
13 there?

14 A. No. Because apparently what happened in that
15 situation, somebody had written something on it. And whoever
16 sent it did not want to be identified. And that is the only
17 logical reason that I can come up with as to why it was
18 blacked out like that.

19 Q. Did you terminate Mr. McMahon?

20 A. No, sir, we did not.

21 Q. Did you terminate the other guy?

22 A. No, sir, we did not.

23 Q. Have either one of them been promoted since then?

24 A. No, sir.

1 Q. Now, it seems to me that if you were truly
2 concerned about children smoking and being exposed to
3 promotions on cigarettes, you would be concerned, Mr. Ford,
4 with your promotions in the Rolling Stone magazine. Are you
5 concerned about that?

6 MR. CRIST: Objection, your Honor. It's beyond the
7 scope of the direct examination. It's also cumulative. It's
8 also irrelevant and immaterial to any issue in this case.

9 THE COURT: Any response?

10 MR. COOK: No, sir. I am cross examining this man
11 who says he has this -- has this concern --

12 THE COURT: That's fine. He indicated a general
13 personal opinion and the position of the company in this
14 area. I am going to allow him to inquire. I will -- I am
15 mindful of it being gone into with other witnesses. But I
16 think he has got a right to inquire. And he can use this
17 exhibit.

18 THE WITNESS: Okay.

19 Q. (By Mr. Cook) Yeah. Are you concerned about
20 advertisements that your company has in Rolling Stone?

21 A. No, sir.

22 Q. Why not?

23 A. It's an adult magazine.

24 Q. Do you know David Iauco?

1 A. I certainly do.

2 Q. Do you know how many people under 18 year olds --
3 under 18 years old that Mr. Iauco said received Rolling Stone
4 magazine?

5 A. No, sir, I do not.

6 Q. Two million.

7 MR. CRIST: Objection, your Honor.

8 Mischaracterization of the record.

9 MR. COOK: That's true. Mr. Iauco said -- I will
10 withdraw the question.

11 THE COURT: Sustained.

12 Q. (By Mr. Cook) Mr. Iauco said that 70 percent of the
13 -- 76 percent of the 8 million circulation of Rolling Stone
14 magazine was over the age of 18. That means necessarily that
15 24 percent of 8 million is under the age of 18 to me anyway.
16 Does it mean that to you?

17 MR. CRIST: Objection, your Honor.

18 Mischaracterization of the record.

19 MR. COOK: That is exactly what he said.

20 MR. CRIST: In addition, it's cumulative.

21 THE COURT: The objection is overruled on
22 cumulative. I would have to check the record on the 24
23 percent. I will have to leave that to the jury's
24 recollection of the evidence at this time. I will attempt to

1 do that. You may proceed.

2 Q. (By Mr. Cook) Are you aware of that, that
3 one-fourth of Rolling Stone's market is under 18?

4 A. No, sir.

5 Q. You don't get Rolling Stone?

6 A. No, I don't.

7 Q. Not any more or did you ever?

8 A. I'm sorry. I do get it. That's one of the ones on
9 the comp. list. I never read it. It comes in. It's
10 generally thrown away.

11 Q. You are not into Axl Rose or anything like that,
12 are you?

13 A. I don't even know what you are talking about.

14 Q. The Hammer. Do you know who M.C. Hammer is?

15 A. I'm sorry, sir. I am not into that.

16 Q. Pink Floyd?

17 A. No.

18 Q. You are not into heavy metal, I guess?

19 A. No. I am into C&W.

20 Q. Now, what you are concerned about and what you were
21 concerned about in 1990 was the fact that Dr. Louis Sullivan,
22 the Secretary of Health, Education and Welfare, was attacking
23 your company on your advertising practices, was he not?

24 A. He has attacked us at various times. I don't know

1 specifically the date.

2 Q. Well, let me show you, sir, Plaintiff's Exhibit No.
3 19B and refer you to the page -- the last paragraph on page 5
4 and the first paragraph -- or the first paragraph on page 6.
5 I might point out to you that that's a speech given by your
6 boss.

7 A. Okay.

8 Q. You can see that in June of 1990, about three
9 months after the period that you were reprimanding these
10 people, that Mr. Johnston was talking about Louis Sullivan's
11 continued attacks. And the previous paragraphs, "And they're
12 attacking specific efforts, promotions and campaigns." I
13 mean that -- Dr. Louis Sullivan who received or at least
14 purported to receive a copy of that letter was after you
15 guys, wasn't he?

16 A. He is well known for his position, I think.

17 Q. He is after you. He thought you encouraged kids to
18 smoke, didn't he?

19 A. He was -- like I said, I think his position was
20 well known.

21 Q. Yes, sir. I am not so sure the jury knows it. You
22 and I know it. He thought -- he thought and was of the
23 position that the huge amounts of money that your industry
24 spent on advertising and promoting your products induced

1 children to smoke. That's what Sullivan thought.

2 MR. CRIST: Objection, your Honor. It's calling
3 for hearsay. It's calling for speculation. In addition to
4 that, it's preempted. In addition to that, it's cumulative.
5 We spent weeks going over this stuff.

6 THE COURT: I am going to overrule the objection
7 and I am going to allow the gentleman to answer it. You may
8 proceed. Go ahead.

9 THE WITNESS: Would you please repeat the question?

10 Q. (By Mr. Cook) Yes, sir. I will be glad to. At
11 this period of time when you received a letter that looks
12 like you have got a -- a whistle-blower inside RJR, does it
13 not?

14 A. Could be. I don't know who it was.

15 Q. Whistle-blower is a term known to you -- that you
16 understand to mean somebody --

17 A. Sure. I understand the meaning.

18 Q. And at least you had every reason to believe that
19 Sullivan had received a copy of the letter?

20 A. I had no way of knowing, sir.

21 Q. Well, I mean, the normal -- if you receive a copy
22 of a letter that purports to be sent to Dr. Sullivan, it
23 would be reasonable to believe that perhaps somebody sent it
24 to him?

1 MR. CRIST: Objection, your Honor. Calls for
2 speculation.

3 THE WITNESS: Could have, but I don't know.

4 THE COURT: I think it calls for speculation.
5 Sustained.

6 Q. (By Mr. Cook) Dr. Sullivan's position was and his
7 attacks against you was because Sullivan said that you
8 encouraged people, not only children, but children to smoke
9 with your advertising and promotion budgets. That's what he
10 said, isn't it?

11 MR. CRIST: Objection, your Honor. Calls for
12 speculation. Also involves hearsay, lacks foundation.

13 THE COURT: Why are you offering this testimony?

14 MR. COOK: I am offering it to show his state of
15 mind in his actions on taking this drastic step of
16 reprimanding these people.

17 THE COURT: You are not offering it for the truth
18 of the matter asserted?

19 MR. COOK: No, sir.

20 THE COURT: I don't believe it's hearsay because he
21 is not using it or offering it for the truth of the matter
22 asserted. It can be considered to show why the witness took
23 certain action or to explain his state of mind. He can
24 answer it under those conditions. Do you want that repeated?

1 THE WITNESS: Please do, sir.

2 THE COURT: Do you want me to have it read back or
3 do --

4 MR. COOK: I have asked it twice. So maybe reading
5 it back --

6 THE COURT: Donna, will you go back to the last
7 question, please?

8 (At this time the Court Reporter read back the
9 following question: "Q. Dr. Sullivan's position
10 was and his attacks against you was because Sullivan
11 said that you encouraged people, not only children,
12 but children to smoke with your advertising and
13 promotion budgets. That's what he said, isn't it?")

14 THE WITNESS: Is that the question?

15 Q. (By Mr. Cook) Yes.

16 A. Okay. That's what he has said, yes.

17 Q. And he and the American Medical Society had both
18 proposed that your industry be barred from advertising and
19 promoting your products, have they not?

20 A. I believe he has done that, yes.

21 Q. Now, when you considered this reprimand -- do you
22 consider that pretty drastic action to take against these
23 people?

24 A. Yes, sir, I do.

1 Q. I bet. Did you talk about it with Mr. Johnston?

2 A. No, sir.

3 Q. Did you talk about it with -- I mean did you just
4 do this all on your own or did you tell your superiors that
5 some of your subordinates -- not just one, but two were --
6 had violated your rules about youth solicitation?

7 A. They were aware of it, yes, sir.

8 Q. How were they made aware of it?

9 A. I believe Mr. Johnston received a copy of the
10 letter also, I believe. I'm not sure. I know I got one.

11 Q. Did you do anything to investigate who had sent the
12 letter?

13 A. We sent our security department down to the
14 Sarasota division, yes. First of all, we were not looking to
15 do anything to the individual. You don't penalize people for
16 following procedures. You penalize them when they don't.
17 And that's what we done with Mr. McMahon and Mr. Warlick.

18 Q. Well, of course, mailing letters to the Surgeon
19 General of the United States isn't one of your procedures.

20 A. I don't know that they mailed it.

21 Q. Did you fingerprint the letters?

22 A. No, sir.

23 Q. You weren't ever able to find out who this
24 whistle-blower was?

1 A. We never pursued it. We were looking at were there
2 other issues in the division that were being violated also.

3 Q. How many security people did you send down?

4 A. I believe it was one.

5 Q. Did you send any security people to Oklahoma?

6 A. No, sir, we did not, to the best of my
7 recollection.

8 Q. How many people did Mr. McMahon or -- send his
9 letter to?

10 A. I am not -- I don't recall. It would be somewhere
11 between and -- probably 9 and 12. That's the approximate
12 size of our divisions. And I don't know the exact number
13 that Mr. McMahon had in his division.

14 MR. COOK: Thank you.

15 THE COURT: Mr. Crist?

16 MR. CRIST: Nothing further, your Honor.

17 THE COURT: Mr. Hepler?

18 MR. HEPLER: Nothing, your Honor.

19 THE COURT: Mr. Nester?

20 MR. NESTER: No, your Honor.

21 THE COURT: Thank you, sir. Watch your step,
22 please.

23 (Witness excused.)

24 THE COURT: Who is your next witness?